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No. 82-792

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, et al.,
Petitioners,

v.

T. H. BELL, Secretary of the United States Department of Education, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, GROVE CITY COLLEGE, et al.

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees (Board) composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where it believes the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of this brief on behalf of PLF and its members.

Due to its public interest perspective, PLF believes that it can provide this Court with a more complete argument on the question whether the Department of Education may terminate direct grants to students without any finding of discrimination on the part of a college.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Third Circuit, is reported at 687 F.2d 648 (3d Cir. 1982). The opinion of the United States District Court, Western District of Pennsylvania, is reported at 500 F. Supp. 253 (W.D. Pa. 1980).

STATEMENT OF THE CASE

Grove City College (Grove) is a private coeducational institution located in Grove City, Pennsylvania. Of its approximately 2,200 students, 140 are eligible to receive federal Basic Educational Opportunity Grants (BEOG) and 342 have obtained Guaranteed Student Loans (GSL). Grove itself receives no federal or state financial assistance; the BEOGs and GSLs are paid or loaned directly to the students. Grove's only role is in the case of BEOGs, a certification regarding the student's costs and enrollment status.

In July, 1976, coincidental with this nation's bicentennial, the Department of Education's (Department) predecessor, Department of Health, Education and Welfare, began efforts to require Grove to execute a so-called Assurance of Compliance based on receipt of BEOGs and GSLs by Grove students, certifying compliance with Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681, *et seq.*). Title IX prohibits gender-based exclusion from participation in any education program or activity receiving federal financial assistance. Grove refused to execute the Assurance of Compliance on the ground that it received no federal financial assistance.

After an administrative hearing the Department concluded that although there was no indication of sex discrimination by Grove, Grove was a recipient of federal financial assistance. The Department therefore prohibited the payment of BEOGs or GSLs to students attending Grove.

Grove, joined by four student recipients of BEOGs and GSLs, filed suit in District Court. The District Court granted summary judgment to Grove on the basis, *inter alia*, that the Department could not bar Grove students from BEOG and GSL participation unless it found that Grove was engaged in discrimination prohibited by Title IX. The Court of Appeals reversed. This Court granted certiorari on February 22, 1983.

SUMMARY OF ARGUMENT

A finding of discrimination on the basis of sex is a prerequisite to the imposition of Title IX's funding sanctions. The Department's sanctions here penalize rather

than protect the students who are the intended beneficiaries of Title IX. The Department may not, consistent with Title IX and due process, hold students hostage merely to vindicate its bureaucratic authority where there is no indication of any discrimination on the part of the college.

ARGUMENT

TITLE IX REQUIRES A FINDING OF DISCRIMINATION BEFORE FUNDING SANCTIONS MAY BE IMPOSED

Amicus curiae, PLF, directs its argument only to the question whether the Department may prohibit Grove students from participating in the BEOG and GSL programs when there is no indication that Grove has engaged in discrimination. Title IX provides: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). PLF believes that the Department has so misconstrued Title IX that it is the Department, not Grove, which is excluding persons from participation in educational activities.

After the compliance hearing, the administrative law judge ruled "'[t]here was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief.'" *Grove City College v. Harris*, 500 F. Supp. 253, 255 (W.D. Pa. 1980). The District Court similarly found no evidence or even allegation of sex discrimination. *Id.* at 268. The

sole reason the Department is sanctioning Grove students is Grove's refusal to submit to the Assurance of Compliance form. In fact, what is at issue is the glorification of the Department's Assurance of Compliance form over the substance of sex discrimination.

The District Court put it lucidly:

> "It is the firm belief of this Court that termination of the BEOG student aid payments and/or the GSL payments is not the proper remedy for coercing the College into filing an Assurance of Compliance where there is no allegation or evidence of sex discrimination and where the students who are receiving BEOG and GSL benefits will be punished needlessly for no good purposes." *Id.*

The District Court noted the student plaintiffs' affidavits stated that they cannot continue attending the college of their choice if their BEOG and/or GSL funds are terminated. *Id.* at 270. That court further noted the important government interests advanced by encouraging our youth to improve their productivity and the importance to the future of our nation to bring within the reach of our less economically favored youth, the educational opportunities available to the well-to-do. *Id.* Instead of exercising this stewardship of the public trust, the Department seems determined not to help students through school, but to force them out of it.

The District Court correctly saw that the BEOG and GSL programs and Title IX legislation were all three specifically designed to protect and advance the rights of students. But termination of a student's grant or loan without any finding of discrimination on the part of the college unfairly punishes the innocent student without his

or her receiving any concomitant benefit. Certainly Congress never intended this absurd result. *Id.*

This Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 (1979), that Congress drafted Title IX with an unmistakable focus on the benefited class rather than simply a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. The Department with its emphasis on forms for forms' sake has lost sight of this human element.

By contrast, this Court in *Cannon* noted that termination of federal financial support is a severe remedy and often may not provide an appropriate means of protecting individuals against discrimination. *Id.* at 704. Certainly stripping students of the ability to attend the school of their choice seems an utterly inappropriate means of "protecting" them from a discrimination which has never even been alleged.

Cannon analogizes Title IX to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, and quotes Senator Humphrey's explanation:

> "'[Title VI] encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education. . . . Cutoff of funds needed for such purposes should be the last step, not the first, in an effective program to end racial discrimination.'" *Id.* at 721-22.

Apparently the Department has not heeded this Court's cautionary statements as to such rash and unnecessary

actions. Neither has it heeded the "Congressional purpose to avoid a punitive as opposed to a therapeutic application of the termination power." *Board of Public Instruction of Taylor County, Florida v. Finch,* 414 F.2d 1068, 1075 (5th Cir. 1969). There, the Fifth Circuit noted the importance that the antidiscrimination acts be "shielded from a vindictive application." *Id.* at 1078. Unfortunately, the perception left by the Department's conduct in this case is not one of protecting students but of vindicating its bureaucratic authority.

In order to prevent this abuse of authority the Fifth Circuit required that "the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." *Id.* at 1079.

This requirement of a factual finding of discrimination was rejected by the Court of Appeals in this case. *Grove City College v. Bell,* 687 F.2d 684, 703 (3d Cir. 1982). The court relied on *Gardner v. State of Alabama,* 385 F.2d 804 (5th Cir. 1967). *Bell,* 687 F.2d at 703. In *Gardner,* however, the State of Alabama admittedly provided benefits to blacks and whites in a different manner, solely on the basis of their race. *Gardner,* 385 F.2d at 816-17. Thus while an Assurance of Compliance would be appropriate in *Gardner* to end admitted discrimination, the case is not relevant to the present situation where there is no evidence of discrimination.

The Court of Appeals also relied on language in *United States v. El Camino Community College District,* 600 F.2d

1258, 1260 (9th Cir. 1979), to the effect that the Department in exercising its investigatory powers "'must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance,'" *quoted in Bell,* 687 F.2d at 703. The point missed by the court is that the Department's scrutiny of Grove's policies and practices led to a finding by its administrative law judge that there "was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX." *Grove City College v. Harris,* 500 F. Supp. at 255.

Given the extreme prejudice to the affected students, the intended beneficiaries of Title IX, of the Department's termination of their grants and loans, the fundamentals of due process require a finding of discrimination before imposition of such sanctions. The Court of Appeals, relying on *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980), found no due process issue. *Bell,* 687 F.2d at 704. The court, however, overlooked the critical fact that the nursing home in *O'Bannon* had been surveyed by the cognizant agency and had been found deficient in seven of eighteen requirements. *O'Bannon,* 447 U.S. at 776 n.3. Here the Department's hearing found no violations or deficiencies involving discrimination. To strip Grove students of their ability to attend the school of their choice absent such finding is a violation of their due process rights. *Grove City College v. Harris,* 500 F. Supp. at 269-70.

In *North Haven Board of Education v. Bell,* ..... U.S. ....., 72 L. Ed. 2d 299, 319 (1982), this Court cited the

Department's recognition that Title IX "limited its authority to terminate funds to particular programs that were found to have violated Title IX . . . ." Absent such a finding the Department should not be permitted to renege on the promise made by Title IX to the nation's students.

CONCLUSION

The Department's actions in cutting off grants and loans to Grove students without any evidence of discrimination on Grove's part violate both Title IX and due process. Instead of seeking to protect students from discrimination, the Department's actions are calculated merely to demonstrate its authority over nonpublicly funded schools. Such arrogance of power has no place in our federal system. Amicus, PLF, therefore urges that the decision of the Court of Appeal be reversed.

Dated: April 6, 1983.

Respectfully submitted,

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